

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL I. SLOAN,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,
Defendant.

Case No. 11-CV-01439-WQH (JMA)

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE RE: PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT [DOC. 9]
AND DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT [DOC.
11]**

Plaintiff Michael I. Sloan ("Plaintiff") seeks judicial review of Defendant Social Security Commissioner Michael J. Astrue's ("Defendant") determination that he is not entitled to disability insurance benefits. Plaintiff has filed a Motion for Summary Judgment and Defendant has filed a Cross-Motion for Summary Judgment. For the reasons set forth below, the Court recommends Plaintiff's motion be **GRANTED**, Defendant's cross-motion for summary judgment be **DENIED**, and the case be remanded for further proceedings.

I. PROCEDURAL HISTORY

Plaintiff filed an application for disability insurance benefits on March 29, 2007 alleging a disability onset date of March 1, 2002. (Admin. R. at 116-30.) Plaintiff's claim

1 was denied initially on July 18, 2007, and again upon reconsideration on December 18,
2 2007. (Id. at 47-50, 56-59.) Plaintiff requested a hearing before an Administrative Law
3 Judge ("ALJ"). (Id. at 61.) An administrative hearing was conducted on February 4,
4 2010 by ALJ James S. Carletti, who determined that Plaintiff was not disabled. (Id. at
5 13-20.) Plaintiff requested a review of the ALJ's decision; the Appeals Council for the
6 Social Security Administration denied Plaintiff's request for review on May 10, 2011. (Id.
7 at 1-3.) Plaintiff then commenced this action pursuant to 42 U.S.C. § 405(g).

8 **II. FACTUAL BACKGROUND**

9 Plaintiff was born on January 9, 1950. (Id. at 118.) Upon completion of high
10 school in 1968, he volunteered for the United States Marine Corps. (Id. at 119, 795.)
11 He was deployed to Vietnam where he was involved in combat from December 1968 to
12 October 1969. (Id. at 30, 795.) On July 14, 1972, he separated from the Marine Corps.
13 (Id. at 119.)

14 Plaintiff has worked as a manager (1984-95), regional manager (1995-97;
15 1998-99), implementation manager (1997), and a project manager (1997-98; 1999) in
16 the information technology field. (Id. at 200, 204, 794.) In addition, he worked as a
17 pedicab driver periodically in 2001 and 2002. (Id. at 27.) He received a Master's
18 Degree in Business from Georgetown University in 1986 and a Master's Degree in
19 Information Technology from George Washington University in 1996. (Id. at 27, 794.)

20 Plaintiff alleges he is disabled due to Posttraumatic Stress Disorder ("PTSD").
21 (Id. at 191.) Plaintiff received a disability rating of 100% from the Department of
22 Veteran's Affairs ("VA") in February 2004. (Id. at 28.)

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1 III. MEDICAL EVIDENCE

2 A. VA San Diego Healthcare System, Treating Psychologists and Treating 3 Physicians (1999-2009)¹

4 Virtually all of the medical records contained in the administrative record before
5 the Court relate to treatment received by Plaintiff at the VA. On December 13, 1999,
6 Plaintiff self-reported to the VA to seek treatment for his alcohol dependence. (Id. at
7 598-99.) During his initial consultation, Plaintiff was assigned a Global Assessment of
8 Functioning ("GAF") score of 40.² (Id. at 599.) On the same date, Plaintiff participated
9 in his first group therapy session where he acknowledged that all of his life problems
10 had been alcohol use-related. (Id. at 597-98.) On December 17, 1999, Plaintiff self-
11 reported to an inpatient alcohol treatment program at the VA. (Id. at 592-93.) Plaintiff
12 completed the inpatient alcohol treatment program and was discharged on January 14,
13 2000. (Id. at 423.) Upon discharge from the inpatient program, Plaintiff was assigned a
14 GAF score of 60.³ (Id. at 423, 622.) Shortly thereafter, on January 19, 2000, Plaintiff
15 moved into the Wayback Recovery Home. (Id. at 568.)

16 On March 13, 2000, Plaintiff underwent a PTSD evaluation pursuant to a referral
17 from his Alcohol and Drug Treatment Program. (Id. at 558-62.) Plaintiff complained of
18 nightmares, distressing memories, and hypervigilance. (Id. at 559.) He reported

19 ¹The Court notes that Plaintiff's medical records from 2006 were not included in the
20 Administrative Record.

21 ²The Global Assessment of Functioning scale, or GAF scale, is a numeric scale (0
22 through 100) used by mental health practitioners to rate social, occupational, and
23 psychological functioning, with lower numbers representing more severe symptoms,
24 difficulties, or impairments. The scale is presented in the Diagnostic and Statistical Manual of
25 Mental Disorders. A GAF of 31-40 indicates "[s]ome impairment in reality testing or
26 communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment
in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g.,
depressed man avoids friends, neglects family, and is unable to work; child frequently beats up
younger children, is defiant at home, and is failing at school)." American Psychiatric Ass'n,
Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (2000)
(DSM-IV), 32.

27 ³ A GAF of 61-70 indicates "[s]ome mild symptoms (e.g., depressed mood and mild
28 insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional
truancy or theft within the household, but generally functioning pretty well, has some
meaningful interpersonal relationships.)" DSM-IV, 32.

1 beginning heavy beer drinking in Vietnam, which increased in frequency over the years,
2 and that drinking daily began about six months prior to his last drink on December 8,
3 1999. (Id.) He also reported having nightmares that focused on a firefight and a
4 helicopter crash he was involved in while deployed to Vietnam from December 1968 to
5 October 1969. (Id. at 560.) Plaintiff described being hypervigilant and hiding a sense of
6 intense fear related to his combat exposure. (Id.) Plaintiff was diagnosed with Alcohol
7 Dependence with Physiological Dependence in Early Full Remission and Chronic PTSD
8 by Dr. Gershwin, a VA psychiatrist. (Id. at 561.) Additionally, Dr. Gershwin assigned
9 Plaintiff a GAF score of 45.⁴ (Id. at 562.)

10 Plaintiff met regularly with Dr. Jeffrey L. Matloff, a staff psychologist at the VA,
11 over the course of six years (2000-2006) for individual and group psychotherapy
12 sessions. At his first group psychotherapy session in April of 2000, Plaintiff reported to
13 Dr. Matloff that he was coping reasonably well with his PTSD symptoms by avoiding
14 reminders. (Id. at 788.) Two months later, he reported having difficulty coping with his
15 PTSD symptoms, but felt somewhat stable in his sobriety. (Id. at 772.) Plaintiff
16 expressed frustration with the VA for its slowness in recognizing his combat-related
17 injuries. (Id. at 784.) He also reported finding a job as a pedicab driver for 50 hours per
18 week. (Id. at 782.) On May 15, 2000, Dr. Matloff diagnosed Plaintiff with PTSD and
19 Alcohol Dependence in Early Remission. (Id. at 781.)

20 During the second half of 2000, Plaintiff reported to Dr. Matloff that he was more
21 troubled by his PTSD symptoms, including dreams and intrusive recollections. (Id. at
22 768.) He also described his sleep as being more fitful, and he did not want any
23 medication to aid his sleep. (Id.) On November 20, 2000, Dr. Matloff's sole diagnosis
24 was PTSD. (Id. at 747.)

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27 ⁴ A GAF of 41-50 indicates "[s]erious symptoms (e.g., suicidal ideation, severe
28 obsessional rituals, frequent shoplifting) OR any serious impairment in social,
occupational, or school functioning (e.g., no friends, unable to keep a job)." (DSM-IV),
32.

1 On November 17, 2000, Plaintiff underwent a physical examination by Dr. Hilda
2 Thorisdottir, a staff physician at the VA. (Id. at 747-50.) He reported always having
3 poor sleep, as well as having nightmares two to three nights per week. (Id. at 748.) He
4 stated that his PTSD was not diagnosed until December 1999. (Id.) He reported having
5 flashbacks during the day, depending on his level of activity. (Id.) The flashbacks were
6 triggered by smells, burning pork, heavy rain, explosions, and loud noises. (Id.) As a
7 result of the flashbacks, he would hyperventilate, become anxious, and break out in a
8 sweat. (Id.) Plaintiff also mentioned that he was very concerned about becoming
9 dependent on medications. (Id.)

10 Over the course of 2001, Plaintiff reported to Dr. Matloff that he was experiencing
11 a moderate increase in his PTSD symptoms and was feeling lonely and isolated,
12 especially after the September 11th terrorist attacks. (Id. at 723, 742, 746.) He also
13 reported having difficulty dealing with unstructured time. (Id. at 733.) He expressed an
14 interest in medication, but was unwilling to consider taking any at the time. (Id.) Dr.
15 Matloff advised him to increase his leisure activities so that he would have less time to
16 focus on his PTSD symptoms. (Id.)

17 In the first half of 2002, Plaintiff reported to Dr. Matloff that he was having trouble
18 with insomnia and nightmares, but felt that he was coping with it better and still
19 preferred to not take medication. (Id. at 709, 717, 719.) In June of 2002, he expressed
20 to Dr. Matloff that he was not in crisis and felt as though he had reached a plateau in his
21 life. (Id. at 703.) He also recognized that he might never be able to work in his former
22 profession again. (Id.)

23 On September 3, 2002, Dr. Matloff wrote a letter summarizing Plaintiff's Alcohol
24 Dependence and PTSD history. (Id. at 609-10.) Dr. Matloff explained that Plaintiff's
25 symptoms included intrusive recollections and nightmares, inability to fall asleep and
26 stay asleep, isolation, and hypervigilance. (Id. at 609.) He described Plaintiff as a
27 person in recovery who had not participated in psychotropic medication treatment. (Id.)
28 Dr. Matloff noted that perhaps because of Plaintiff's high educational attainment and

1 verbal skills, he frequently presented as more functional than his actual behavior. (Id.)
2 Dr. Matloff's diagnosis was Delayed Onset PTSD. (Id.) Further, he assigned Plaintiff a
3 GAF score of 40.⁵ (Id. at 610.) Dr. Matloff opined that Plaintiff was unlikely to ever
4 return to any kind of employment on a regular basis and that Plaintiff appeared to be
5 permanently and totally disabled. (Id.)

6 In early 2003, Plaintiff reported to Dr. Matloff that he was having increased
7 physical problems from working as a pedicab driver. (Id. at 694.) He also reported
8 having increased PTSD symptoms, including disrupted sleep due to increased media
9 coverage of the war. (Id. at 690.) In addition, he felt he was able to tolerate his
10 intrusive symptoms and anxiety somewhat better when dealing with the anniversary of
11 his being wounded in Vietnam. (Id. at 683.)

12 On April 25, 2003, the VA issued a decision that increased Plaintiff's 50%
13 disabling rating to 70%, effective March 31, 2000. (Id. at 253-55.) The VA also granted
14 his entitlement to individual unemployability, effective March 31, 2000. (Id. at 253.) The
15 rating was based on findings that indicated Plaintiff had serious social and industrial
16 impairments with difficulty in adapting to stressful circumstances, poor impulse control,
17 decreased concentration, as well as other symptoms of PTSD. (Id. at 255.) Based on
18 these symptoms, the VA found that Plaintiff was not totally disabled. (Id. at 255.)

19 In the latter part of 2003, Plaintiff met with Dr. Matloff twice. (Id. at 664, 670.)
20 Dr. Matloff noted that Plaintiff appeared to be coping with his PTSD symptoms through
21 activity and exercise. (Id. at 664.)

22 Similarly, in 2004, Plaintiff met with Dr. Matloff twice. (Id. at 644-45, 659.)
23 Plaintiff reported that his major goal was to maintain a healthy lifestyle in order to deal
24 with his alcohol recovery and PTSD. (Id. at 659.) He also stated that he was open to
25 new ways of controlling his anticipatory anxiety. (Id. at 659.) Dr. Matloff noted that
26 Plaintiff was continuing to cope with his symptoms of PTSD, which included nightmares
27 and disrupted sleep. (Id. at 645.)

28 ⁵ See supra, note 2 regarding GAF of 31-40.

1 On March 10, 2005, Plaintiff expressed an interest in taking medication to sleep
2 better to Dr. Matloff. (Id. at 633.) Shortly thereafter, on March 25, 2005, he was
3 prescribed Trazodone for his sleep disorder by Dr. Neil A. Kline, a psychiatrist at the
4 VA. (Id. at 631-32.)

5 On October 26, 2006, at Plaintiff's request, Dr. Matloff wrote a letter in which he
6 opined that Plaintiff was totally and permanently disabled as a result of having PTSD.
7 (Id. at 611.) He also opined that Plaintiff's disability rating should be at 100%. (Id.)

8 On January 4, 2007, Plaintiff underwent an examination by Dr. Daniel Kim, a
9 staff physician at the VA. (Id. at 613.) Plaintiff described previously taking Trazodone
10 to address his sleep issues. (Id.) As a result of Trazodone becoming less effective for
11 him, he was prescribed Elavil on December 26, 2006. (Id.) Plaintiff reported having
12 continued episodic flashbacks, but that his PTSD symptoms were stable. (Id.) Plaintiff
13 discussed a psychotic episode that resulted in brief psychiatric hospitalization in April of
14 2006. (Id.) He believed the episode was brought on by family stresses that led to
15 heightened anxiety and insomnia for a period of roughly 72 hours. (Id.) He indicated
16 experiencing paranoia and bizarre hallucinations. (Id.) He stated that his symptoms
17 were resolved within 48 hours after admission and since then he had not had a
18 recurrence. (Id.)

19 On June 13, 2007, Plaintiff met with Dr. Susan Tate for his first psychotherapy
20 appointment since Dr. Matloff's retirement in December 2006. (Id. at 535-36.) Plaintiff
21 requested the appointment because he had not slept for two nights straight, resulting in
22 poor concentration and his "feeling squirrely." (Id. at 536.) Dr. Tate and Plaintiff agreed
23 further appointments would be on an as-needed basis since his functioning at the time
24 did not suggest the need for more structured appointments. (Id.)

25 During the latter half of 2007 and through 2008, Plaintiff underwent three check-
26 up examinations by Dr. Thorisdottir. (Id. at 493-97, 507-11, 529-32.) He reported he
27 was taking Elavil to help with sleeping, but that he felt groggy the next morning if he
28 took it later than 6:00 p.m. (Id. at 495, 509, 530.) He also reported having nightmares

once per week, being hypervigilant, and having occasional intrusive thoughts. (Id.) The smell of diesel and songs from the Vietnam era played on the radio triggered flashbacks. (Id.) Plaintiff declined a prescription for medication to help him deal with nightmares. (Id. at 530.)

B. Ajit Raisinghani, M.D., Seagate Medical Group, Examining Physician (2007)

Plaintiff underwent an internal medicine evaluation with Dr. Ajit Raisinghani of Seagate Medical Group on May 22, 2007 at the request of the Department of Social Services. (Id. at 258-61.) Dr. Raisinghani opined that Plaintiff had no limitations. (Id. at 261.)

C. H. Douglas Engelhorn, M.D., Examining Psychiatrist (2007)

Plaintiff underwent a psychiatric evaluation with Dr. H. Douglas Engelhorn on June 11, 2007. (Id. at 266-69.) Plaintiff reported a history of hyperactivity, hypervigilance, and insomnia. (Id. at 267.) He said he was able to take care of all of his basic needs and was involved in a variety of household chores. (Id.) He volunteered at the VA Hospital and Camp Pendleton two times each week. (Id.) He also attended Alcoholics Anonymous ("AA") meetings four times each week, regularly used a pistol range, and played golf with regularity. (Id.) Plaintiff told Dr. Engelhorn that he was steadily employed for most of his adult life and stopped working in 1999 largely because sobriety increased his symptoms relating to PTSD. (Id. at 266.)

Plaintiff's mental status examination revealed: (1) an alert, cooperative, white male appearing his stated age of 57 years; (2) adequately dressed and groomed and probably of above average intelligence; (3) speech is normal and no unusual mannerisms are noted; (4) appears to be in excellent physical health; and (5) fully ambulatory without assistance. (Id. at 267.) Dr. Engelhorn diagnosed Plaintiff as having PTSD, with Primary Insomnia, and Alcohol Dependence in Full Remission. (Id. at 268.) Dr. Engelhorn opined that Plaintiff had no cognitive impairment, could perform simple, repetitive tasks as well as complex and detailed work, and assigned Plaintiff a

1 GAF score of 65-70.⁶ (Id. at 268-69.)

2 **IV. THE ADMINISTRATIVE HEARING**

3 The ALJ conducted an administrative hearing on February 4, 2010. (Id. at 26.)

4 **A. Plaintiff's Testimony**

5 Plaintiff testified at the hearing on February 4, 2010. (Id. at 27-36.) Plaintiff
6 stated he was sixty years old and lived with his wife, whom he married in 2007. (Id. at
7 27, 29.) In addition, he stated that, at the time of the hearing, he had a thirty year old
8 son and a twenty-four year old daughter. (Id. at 29.) Plaintiff received his Bachelor's
9 Degree from American University, a Master's Degree in Business Administration in
10 1986 from Georgetown University, and a Master's Degree in Information Technology in
11 1996 from George Washington University. (Id. at 27, 30.) Plaintiff testified that he was
12 steadily employed from 1966 to 1999. (Id. at 30.) Plaintiff last worked full-time in 1999
13 as a program manager on a contract he secured with the Department of Housing and
14 Urban Development. (Id. at 27.) In 2001 and 2002, he periodically worked part-time as
15 a pedicab driver until he "could not handle it." (Id.)

16 Plaintiff testified that his PTSD was caused by something he was exposed to in
17 the military. (Id. at 30.) While in the military, Plaintiff was involved in combat and,
18 specifically, was at Mount Jordan for Black September. (Id.) He received two purple
19 hearts, a combat action ribbon, and a Vietnamese Cross of Gallantry. (Id.)

20 Plaintiff testified that he had problems with alcohol and until his last drink on
21 December 8, 1999, he had been drinking daily. (Id. at 29, 31.) He came to San Diego
22 in 1999 and stayed with his parents for about two weeks before going into the VA. (Id.
23 at 34.) After the VA, he lived in a halfway house and then moved to a sober living
24 environment where he remained until he married. (Id.)

25 Plaintiff testified that after he became sober, he got in touch with feelings that he
26 had been suppressing. (Id. at 31.) He thought he was losing his mind, had almost daily
27 intrusive thoughts, had trouble sleeping, increasingly gnawed on his teeth, and was

28 ⁶ See supra, note 3 regarding GAF of 61-70.

1 seeking to isolate more often than not. (Id. at 31, 32.) Plaintiff indicated he still suffered
2 from insomnia and averaged four to five hours of sleep per night; however, about once
3 or twice per week he did not sleep at all. (Id. at 32.) He said he took sleeping pills to
4 control his sleep, but was careful to take the pills at recommended times. (Id.) He was
5 admitted to the hospital for three days in 2006 as a result of not sleeping for four or five
6 days. (Id. at 31.) He also said he had nightmares at least once or twice per week. (Id.)
7 Plaintiff testified he was given a 100% VA rating in February 2004 based on PTSD. (Id.
8 at 28.) He has been treated ever since receiving the rating and there has been no
9 improvement. (Id. at 28.)

10 Plaintiff stated he attended group counseling for PTSD once per month for ninety
11 minutes. (Id. at 29.) He counseled other soldiers at two VA hospitals twice per week for
12 anywhere from forty-five minutes to two hours. (Id. at 32, 33.) He also drove, cooked,
13 cleaned, bathed himself, and paid his bills. (Id. at 33.) He said he believed he would
14 not be able to hold down a job because of feeling exhausted periodically. (Id.) He
15 stated he would probably miss one or two days of work per week because of his sleep
16 issues. (Id.) He added that he had hearing problems in both ears, as well as knee
17 issues from when he was wounded. (Id. at 34.)

18 In response to questions posed by the medical expert, Plaintiff stated he was
19 unsure of the name of the sleeping pill he took, but mentioned that it typically was a one
20 dose pill that he took almost every night. (Id. at 35.) He testified that the sleeping pill
21 worked more often than not, but periodically it did not work and he was unable to sleep.
22 (Id.) Plaintiff also told the medical expert that he did not wear any hearing aides, but
23 had a 35-40% hearing loss in his right ear and about a 20% loss in his left ear. (Id. at
24 36.) Lastly, Plaintiff stated that he went to about six AA meetings per week. (Id.)

25 **B. Medical Expert Testimony**

26 Miriam Sherman, M.D., testified as a medical expert ("ME") at the administrative
27 hearing held on February 4, 2010. (Id. at 37-41.) She testified that Plaintiff did not meet
28

1 or equal any of the Listings in the Listing of Impairments.⁷ (Id. at 37.) She opined that
 2 Plaintiff did not seem to have any restriction of activities of daily living. (Id.) She also
 3 opined that Plaintiff had mild difficulties maintaining social functioning and
 4 concentration. (Id.) She stated Plaintiff could do simple repetitive or more complex
 5 tasks, public or non-public. (Id.)

6 **C. Vocational Expert Testimony**

7 Vocational expert ("VE") Mary Jesko, Ph.D., testified at the administrative hearing
 8 held on February 4, 2010. (Id. at 41-42.) She categorized Plaintiff's previous work as a
 9 project manager under Dictionary of Occupational Titles ("DOT") number 189.117-030
 10 and as manager of computer operations under DOT number 169.167-082. (Id. at 42.)
 11 She testified that the complexity level of each of these jobs requires a need to apply
 12 principles of logic or scientific thinking to define problems, collect data, establish facts,
 13 draw conclusions, and an ability to interpret an extensive variety of technical instructions
 14 in mathematical or diagramed form. (Id.)

15 **V. THE ALJ DECISION**

16 After considering the record, ALJ Carletti made the following findings:

17

- 18 2. The claimant did not engage in substantial gainful activity during the
 19 period from his alleged onset date of March 1, 2002 through his date last
 insured of December 31, 2004 [citation omitted].
- 20 3. Through the date last insured, the claimant had the following severe
 21 impairment: posttraumatic stress disorder [citation omitted].
- 22 4. Through the date last insured, the claimant did not have an impairment or
 23 combination of impairments that met or medically equaled one of the
 listed impairments in [the Social Security Regulations].
- 24 5. After careful consideration of the entire record, the undersigned finds that,
 25 through the date last insured, the claimant had the residual functional
 26 capacity to perform a full range of work at all exertional levels and could
 perform simple repetitive tasks or more complex tasks, and in a public or
 non public setting.

27 ⁷The Listing of Impairments in the Social Security Regulations ("Listings") sets forth
 28 certain impairments which are considered to be of sufficient severity to prevent the
 performance of any gainful activity. See 20 C.F.R. § 404.1525(a); 20 C.F.R. pt. 404, subpt. P,
 app. 1.

1 6. Through the date last insured, the claimant was capable of performing
2 past relevant work as a regional manager. This work did not require the
3 performance of work-related activities precluded by the claimant's residual
4 functional capacity [citation omitted].

5 7. The claimant was not under a disability, as defined in the Social Security
6 Act, at any time from March 1, 2002, the alleged onset date, through
7 December 31, 2004, the date last insured [citation omitted].

8 (Id. at 13-20.)

9 **VI. STANDARD OF REVIEW**

10 To qualify for disability benefits under the Social Security Act, an applicant must
11 show: (1) he or she suffers from a medically determinable impairment that can be
12 expected to result in death or that has lasted or can be expected to last for a continuous
13 period of twelve months or more, and (2) the impairment renders the applicant
14 incapable of performing the work that he or she previously performed or any other
15 substantially gainful employment that exists in the national economy. See 42 U.S.C. §
16 423(d)(1)(A), (2)(A). An applicant must meet both requirements to be "disabled." Id.
17 Further, the applicant bears the burden of proving that he or she was either permanently
18 disabled or subject to a condition which became so severe as to disable the applicant
19 prior to the date upon which his or her disability insured status expired. Johnson v.
20 Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995).

21 **A. Sequential Evaluation of Impairments**

22 The Social Security Regulations outline a five-step process to determine whether
23 an applicant is "disabled." The five steps are as follows: (1) Whether the claimant is
24 presently working in any substantial gainful activity. If so, the claimant is not disabled.
25 If not, the evaluation proceeds to step two. (2) Whether the claimant's impairment is
26 severe. If not, the claimant is not disabled. If so, the evaluation proceeds to step three.
27 (3) Whether the impairment meets or equals a specific impairment listed in the Listing of
28 Impairments. If so, the claimant is disabled. If not, the evaluation proceeds to step four.
 (4) Whether the claimant is able to do any work he has done in the past. If so, the
 claimant is not disabled. If not, the evaluation continues to step five. (5) Whether the

claimant is able to do any other work. If not, the claimant is disabled. Conversely, if the Commissioner can establish there are a significant number of jobs in the national economy that the claimant can do, the claimant is not disabled. 20 C.F.R. § 404.1520; see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

B. Judicial Review

Sections 205(g) and 1631(c)(3) of the Social Security Act allow unsuccessful applicants to seek judicial review of the Commissioner's final agency decision. 42 U.S.C.A. §§ 405(g), 1383(c)(3). The scope of judicial review is limited. The Commissioner's final decision should not be disturbed unless: (1) The ALJ's findings are based on legal error or (2) are not supported by substantial evidence in the record as a whole. Schneider v. Comm'r of Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000). Substantial evidence means "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court must consider the record as a whole, weighing both the evidence that supports and detracts from the ALJ's conclusion. See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001); Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d 573, 576 (9th Cir. 1988). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009) (citing Andrews, 53 F.3d at 1039). Where the evidence is susceptible to more than one rational interpretation, the ALJ's decision must be affirmed. Vasquez, 572 F.3d at 591 (citation and quotations omitted).

Section 405(g) permits this Court to enter a judgment affirming, modifying, or reversing the Commissioner's decision. 42 U.S.C.A. § 405(g). The matter may also be remanded to the SSA for further proceedings. Id.

VII. DISCUSSION

Plaintiff contends the ALJ's decision to deny him disability benefits was not supported by substantial evidence. Plaintiff makes the following arguments: First, the

1 ALJ failed to properly consider the opinion of Plaintiff's treating psychologist; and
 2 second, the ALJ failed to reject Plaintiff's testimony with specific, clear, and convincing
 3 reasons.

4 **A. The ALJ Did Not Meet His Burden of Articulating Specific and Legitimate**
 5 **Reasons for Rejecting Plaintiff's Treating Psychologist's Opinion**

6 Plaintiff first contends the ALJ failed to properly consider the opinion of Plaintiff's
 7 treating psychologist, Dr. Matloff, and rejected his opinion without providing specific,
 8 clear, and convincing reasons. (Pl.'s Mem. at 5-6.) In response, Defendant contends
 9 the ALJ properly rejected the opinion of Plaintiff's treating psychologist in favor of the
 10 ME Dr. Sherman's opinion. (Def.'s Opp'n at 4-6.)

11 Ninth Circuit case law distinguishes among the opinions of three types of
 12 physicians: "(1) those who treat the claimant (treating physicians); (2) those who
 13 examine but do not treat the claimant (examining physicians); and (3) those who neither
 14 examine nor treat the claimant (nonexamining physicians)." Lester v. Chater, 81 F.3d
 15 821, 830 (9th Cir. 1996). "As a general rule, more weight should be given to the opinion
 16 of a treating source than to the opinion of doctors who do not treat the claimant." Id.
 17 (citing Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987)). While the ALJ may
 18 disregard a treating physician's opinion regardless of whether that opinion is
 19 contradicted, "where the treating doctor's opinion is not contradicted by another doctor,
 20 it may be rejected only for 'clear and convincing' reasons" supported by substantial
 21 evidence in the record. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989);
 22 Lester, 81 F.3d at 830 (citing Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991)).
 23 The same rule applies to the opinions of an examining physician in the absence of any
 24 legitimate conflicting testimony and any reason for the ALJ's rejection of the examining
 25 physician's opinion. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).
 26 Magallanes, 881 F.2d at 751.

27 If the treating physician's opinion is contradicted by another doctor, it may be
 28 rejected only for "specific and legitimate" reasons supported by substantial evidence in

1 the record. Lester, 81 F.3d at 830 (citing Murray v. Heckler, 722 F.2d 499, 502 (9th Cir.
2 1983)). Similarly, an ALJ may reject the testimony of an examining, but nontreating
3 physician, in favor of a nonexamining, nontreating physician when the ALJ gives specific
4 and legitimate reasons supported by substantial evidence in the record. Lester, 81 F.3d
5 at 830-31. "The ALJ can meet this burden by setting out a detailed and thorough
6 summary of the facts and conflicting clinical evidence, stating his interpretation thereof,
7 and making findings." Magallanes, 881 F.2d at 751 (citing Cotton v. Bowen, 799 F.2d
8 1403, 1408 (9th Cir. 1986)).

9 Here, the ALJ mentioned Dr. Matloff's 2005 reports briefly, but did not explicitly
10 "reject" any of Dr. Matloff's opinions or findings. (See Admin. R. at 18.) Defendant
11 contends that the ALJ discussed Dr. Matloff's opinion at length. (Def.'s Mot. at 4.) The
12 Court disagrees with Defendant and finds that the ALJ ignored Dr. Matloff's opinions
13 and findings throughout the majority of his decision, especially those from before 2005.
14 The ALJ also ignored two letters written by Dr. Matloff in 2002 and 2006 in which Dr.
15 Matloff opined that Plaintiff was totally and permanently disabled. (See Admin. R. at
16 609-11.) The ME, while testifying at the administrative hearing, contradicted portions of
17 the opinion of Dr. Matloff (GAF score and severity of PTSD symptoms). To the extent
18 Dr. Matloff's opinion was contradicted, the ALJ was required to proffer specific,
19 legitimate reasons to reject or discount the opinions. Although the ALJ appears to have
20 implicitly rejected the opinion of Dr. Matloff by ignoring it and relying virtually exclusively
21 instead upon the opinion of the ME, this was not a sufficient rejection of Dr. Matloff's
22 opinion under the relevant authority. See, e.g., Hammock v. Bowen, 879 F.2d 498, 502
23 (9th Cir. 1989) (finding that the ALJ's failure to offer any reasons as to why he
24 disregarded the claimant's treating physician's opinions was error); Lester, 81 F.3d at
25 830-31 (requiring articulation of specific and legitimate reasons supported by substantial
26 evidence to discount testimony of examining physicians).

27 Additionally, it was insufficient for the ALJ to merely rely on the fact that the ME
28 had reviewed all evidence in the record in giving her opinion more weight than the

1 opinion of Dr. Matloff. Unless the opinions of a nontreating source are based on
2 independent clinical findings, they may serve as substantial evidence only when they
3 are supported by and consistent with other evidence in the record. See Andrews, 53
4 F.3d at 1041. The opinion of the ME, who never examined Plaintiff, was not based on
5 her own independent clinical findings and was not consistent with all other evidence in
6 the record, and thus her opinion alone could not constitute substantial evidence. See
7 Andrews, 53 F.3d at 1041.

8 The ALJ's failure to properly address Dr. Matloff's opinion was not sufficient
9 under the relevant authority, and constitutes legal error. See Hammock, 879 F.2d at
10 502 (ALJ's failure to offer any reasons as to why he disregarded the claimant's treating
11 physician's opinions was legal error); Lester, 81 F.3d at 830-31 (requiring articulation of
12 specific and legitimate reasons supported by substantial evidence to discount testimony
13 of treating physicians). Given Dr. Matloff's extensive role in Plaintiff's treatment history,
14 Dr. Matloff's opinions warranted more consideration and discussion than provided in the
15 ALJ's decision. See, e.g., 20 C.F.R. § 404.1527 ("Generally, we give more weight to
16 opinions from your treating sources, since these sources are likely to be the medical
17 professionals most able to provide a detailed, longitudinal picture of your medical
18 impairment(s) and may bring a unique perspective to the medical evidence that cannot
19 be obtained from the objective medical findings alone. . . .").

20 In sum, the record does not support the ALJ's implicit rejection of, or failure to
21 adequately discuss, the opinion of Dr. Matloff. The Court finds, absent a proper
22 rejection or discounting of Plaintiff's treating doctor's opinion, the opinion of Dr. Matloff
23 should have been considered at the ALJ's step three analysis of whether Plaintiff's
24 impairments "medically equaled" or "functionally equaled" a disability listed in the
25 Listings of Impairments. "If additional proceedings can remedy defects in the original
26 administrative proceedings, a social security case should be remanded." Lewin v.
27 Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). Accordingly, remand is proper. See
28 McAllister v. Sullivan, 888 F.2d 599, 603-04 (9th Cir. 1989). The Court, therefore,

1 recommends Plaintiff's motion for summary judgment on this issue be GRANTED, and
 2 the ALJ, upon remand, be required to provide further consideration of Dr. Matloff's
 3 opinion.

4 **B. The ALJ Failed to Articulate Clear and Convincing Reasons for Finding**
 5 **Plaintiff's Subjective Symptom Testimony Not Credible**

6 Plaintiff next contends the ALJ failed to reject Plaintiff's testimony with specific,
 7 clear, and convincing reasons. (Pl.'s Mem. at 6-7.) Defendant counters by arguing the
 8 ALJ provided legally sufficient reasons for finding Plaintiff's testimony less than credible.
 9 (Def's. Opp'n at 6-8.)

10 In determining a claimant's residual functional capacity, the ALJ must consider all
 11 relevant evidence in the record, including medical records, lay evidence, and "the
 12 effects of symptoms, including pain, that are reasonably attributed to a medically
 13 determinable impairment." See Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th
 14 Cir. 2006) (citing SSR 96-8p, 1996 WL 374184, at *5). "Careful consideration must be
 15 given to any available information about symptoms because subjective descriptions
 16 may indicate more severe limitations or restrictions than can be shown by objective
 17 medical evidence alone." Id. (citing SSR 96-8p). An ALJ may not disregard a
 18 claimant's testimony regarding her subjective symptoms solely because it is not
 19 substantiated affirmatively by objective evidence. Robbins, 466 F.3d at 883. "[T]o
 20 discredit a claimant's testimony when a medical impairment has been established, the
 21 ALJ must provide 'specific, cogent reasons for the disbelief.'" Orn v. Astrue, 495 F.3d
 22 625, 635. Here, the ALJ set forth the following reasons for finding the Plaintiff was not
 23 credible:

24 First, the claimant has not taken medications consistent with complaints of
 25 disabling symptoms or limitation for any period of twelve continuous
 26 months. Claimant testified he is not taking any medications, and Dr.
 Matloff on March 10, 2005, stated claimant had never taken psychotropic
 medications [citation omitted].

27 Second, although the claimant was found disabled by the VA due to
 28 posttraumatic stress disorder with alcohol dependance [citation omitted],
 claimant testified he has been sober since December 8, 1999, and Dr.
 Sherman testified claimant's alcohol dependence is in full remission.

1 Third, the claimant did not allege an inability to provide his own personal
2 care. Dr. Engelhorn in his consultative examination reported claimant's
3 daily activities consisted of living at home with his wife. He was capable of
4 taking care of his personal needs. He was involved in a variety of
5 household chores including cooking, cleaning, and grocery shopping. He
6 volunteers at the VA hospital two times each week. He also volunteers at
7 Camp Pendleton two times each week. He attends AA meetings four
8 times each week. He regularly uses the pistol range where he enjoys
9 practicing firing pistols. He plays golf with regularity [citation omitted].
10 Additionally, claimant testified he is able to cook, clean, and take care of
11 his personal needs.

12 Fourth, Dr. Matloff on May 5, 2005, reported claimant had gone on a
13 Caribbean cruise with his girlfriend which went fairly well. Dr. Matloff
14 reported claimant was somewhat anxious but mental status exam was
15 within normal limits with no current SI/HI [citations omitted].

16 (Admin. R. at 19.)

17 The ALJ's first proffered reason for finding Plaintiff's testimony not credible is
18 unsupported by the record. The ALJ states that Plaintiff testified that he is not taking
19 any medication. (Id. at 19.) In fact, Plaintiff testified three separate times that he is
20 taking sleeping pills. (Id. at 28, 32, 35.) Also, the ALJ states that on March 10, 2005,
21 Dr. Matloff noted that Plaintiff has never taken psychotropic medications for any period
22 of twelve consecutive months. (Id. at 19.) However, the record reflects that on March
23 25, 2005, just fifteen days after his meeting with Dr. Matloff, Plaintiff began taking
24 Trazodone, a psychotropic medication. (Id. at 631-632.) Although the record is unclear
25 as to how long Plaintiff took Trazodone, the record demonstrates that on January 4,
26 2007, Plaintiff was taking Elavil, a different type of psychotropic medication. (Id. at
27 613.) Subsequent notes by Dr. Thorisdottir state that Plaintiff was still taking Elavil on
28 April 4, 2008 and August 29, 2008. (Id. at 496-497, 509-510.) There is nothing in the
record to suggest that there was a period of time where Plaintiff was not taking Elavil
between January 4, 2007 and August 29, 2008. Thus, the first reason proffered by the
ALJ to discredit Plaintiff's subjective symptom testimony does not constitute a clear and
convincing reason supported by substantial evidence.

The ALJ's rejection of Plaintiff's testimony on the basis that the VA's finding he
was disabled due to PTSD with alcohol dependance was inconsistent with Plaintiff's

1 testimony that he has been sober since December 8, 1999 was also in error. Curiously,
2 the ALJ noted that Social Security regulations prohibit a finding of disability based on
3 alcohol or drug dependence, but he gave no consideration to Plaintiff's PTSD
4 symptoms. (Id. at 19.) The key factor in determining whether the substance abuse is a
5 contributing factor material to the determination of disability is whether the claimant
6 would still be found disabled if he stopped using alcohol and/or drugs. See 20 C.F.R. §
7 416.935(b)(2); Sousa v. Callahan, 143 F.3d 1240, 1245 (9th Cir. 1998). Here, Plaintiff
8 testified that his PTSD symptoms appeared after he became sober. (Admin. R. at 31-
9 32.) Dr. Matloff's first diagnosis of solely PTSD occurred on November 20, 2000,
10 almost one year after Plaintiff's last alcoholic drink. (Id. at 747.) Thus, the second
11 reason proffered by the ALJ to discredit Plaintiff's subjective symptom testimony does
12 not constitute a clear and convincing reason supported by substantial evidence.

13 With respect to the ALJ's third finding, the Court finds that the ALJ's rejection of
14 Plaintiff's complaints based on his daily activities (cooking, cleaning, grocery shopping,
15 volunteering at the VA Hospital and Camp Pendleton, attending AA meetings, using the
16 pistol range, and playing golf) is not supported by substantial evidence. The ALJ relied
17 on Dr. Engelhorn's report that noted Plaintiff volunteers at the VA Hospital and Camp
18 Pendleton twice per week and he attends AA meetings four times per week. (Id. at 267
19 [emphasis added].) Dr. Engelhorn's report also noted that Plaintiff was involved in
20 cooking, cleaning, grocery shopping, firing pistols, and playing golf, but there is no
21 evidence he performs these activities daily. (See Id. at 267.) More importantly,
22 however, in order to discredit Plaintiff's complaints based on evidence of daily activities,
23 the ALJ must find that Plaintiff is able to spend a substantial part of the day engaged in
24 pursuits that involve physical functions that are transferable to a work setting. Gonzalez
25 v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990). While the activities Plaintiff performs
26 do require a sedentary level of exertion, the ALJ did not make the requisite specific
27 findings concerning the transferability of Plaintiff's activities of daily living to his ability to
28 perform work. Thus, the third reason proffered by the ALJ to discredit Plaintiff's

1 subjective symptom testimony does not constitute a clear and convincing reason
2 supported by substantial evidence.

3 It strains reason to understand how the ALJ's fourth proffered reason for finding
4 Plaintiff not credible--that Plaintiff was able to take a cruise with his girlfriend in 2005
5 with only mild anxiety--weighs against Plaintiff. Defendant has provided no explanation
6 as to why this constitutes a clear and convincing reason to reject Plaintiff's subjective
7 symptom testimony and the Court cannot think of any reason why it would.

8 In sum, none of the above listed reasons sufficiently address why Plaintiff's
9 testimony regarding his impairment is not credible. The Court recommends Plaintiff's
10 motion for summary judgment on this issue be GRANTED, and the ALJ, upon remand,
11 be required to reconsider Plaintiff's credibility.


12 **VIII. CONCLUSION**

13 For the reasons set forth above, Plaintiff's motion for summary judgment should
14 be **GRANTED**, Defendant's cross-motion for summary judgment should be **DENIED**,
15 and the case should be remanded for further proceedings.

16 This report and recommendation will be submitted to the Honorable William Q.
17 Hayes, United States District Judge assigned to this case, pursuant to the provisions of
18 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and serve a
19 copy on all parties on or before **September 19, 2012**. The document should be
20 captioned "Objections to Report and Recommendation." Any reply to the Objections
21 shall be served and filed on or before **October 3, 2012**. The parties are advised that
22 failure to file objections within the specified time may waive the right to appeal the
23 district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 **IT IS SO ORDERED.**

25 DATED: August 20, 2012

26 
27 Jan M. Adler
28 U.S. Magistrate Judge